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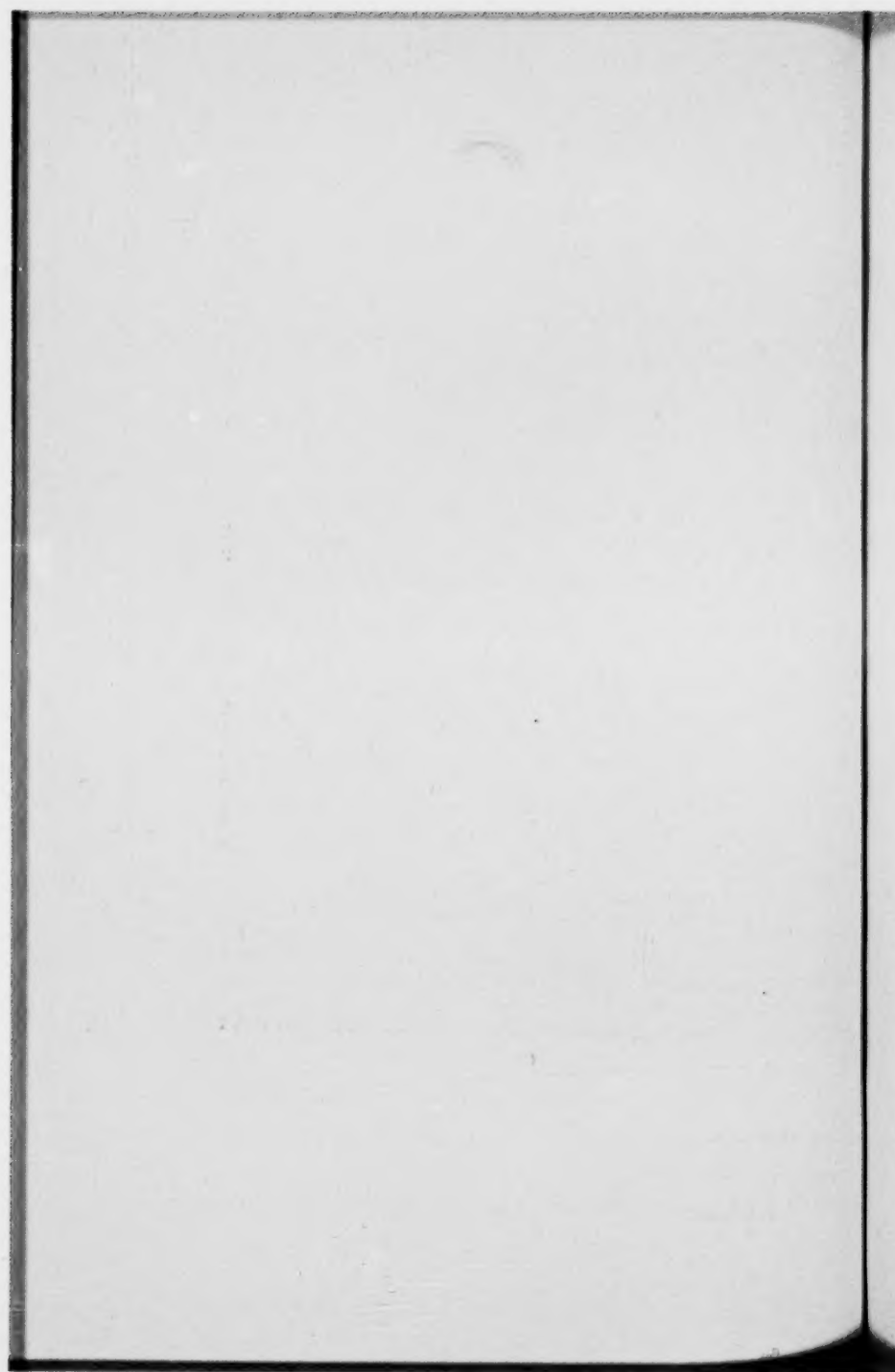
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(11)



# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No. 780

WILLIAM LEE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH  
CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINION BELOW**

The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 50-55) has not yet been reported.

## **JURISDICTION**

The judgment of the circuit court of appeals was entered October 26, 1944 (R. 55), and a petition for rehearing was denied November 27, 1944 (R. 65). The petition for a writ of certiorari was filed December 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the

Criminal Appeals Rules promulgated by this Court May 7, 1934.

**QUESTIONS PRESENTED**

1. Whether the misdesignation of the statute under which the indictment was laid invalidated the indictment.
2. Whether the evidence is sufficient to sustain petitioner's conviction.

**STATUTES INVOLVED**

Section 36 of the Criminal Code, 35 Stat. 1096 (18 U. S. C. 87), prior to its amendment by the Act of November 22, 1943, 57 Stat. 591, provided:

Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished as prescribed in the preceding section.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars,

or imprisoned not more than two years, or both.

Section 47 of the Criminal Code (18 U. S. C. 100) provides:

Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

#### STATEMENT

An indictment was returned against petitioner and two others—Croom and Atyia—in the United States District Court for the Eastern District of Oklahoma, charging them with conspiracy “to commit an offense against the United States of America in violation of Section 80 of Title 18 United States Code,” in that Croom, a member of the armed forces with access to its stores, groceries, and other properties, would unlawfully sell, convey, and dispose of eggs, butter, cheese, and other property from such stores, and petitioner and Atyia, as operators of a mercantile store, would purchase these commodities from Croom with knowledge that they were the property of the United States (R. 1-5).<sup>1</sup> Petitioner demurred to

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<sup>1</sup> There were also two counts charging Croom with felonious sale and the disposal of the commodities (R. 5-6), but the indictment was dismissed against Croom on the United States Attorney's motion for the reason that, before trial,

the indictment upon the ground, *inter alia*, that upon its face it failed to set forth facts constituting an offense under 18 U. S. C. 80 (R. 7). In the course of argument on the demurrer, the United States Attorney stated that the specification of 18 U. S. C. 80 in the indictment was a typographical error,<sup>2</sup> that it was intended to specify 18 U. S. C. 88 (Sec. 37 of the Criminal Code), and that the conspiracy charged was one to violate 18 U. S. C. 87 (Sec. 36 of the Criminal Code) (R. 15). The trial judge overruled the demurrer (R. 15), and, after trial, petitioner was found guilty (R. 7-8) and sentenced to imprisonment for 18 months (R. 9-10).

On appeal, the Circuit Court of Appeals for the Tenth Circuit affirmed the conviction (R. 55), holding that, although Section 36 of the Criminal Code was inoperative as a criminal statute because of its failure to specify a definite punishment, the indictment nevertheless was sufficient, since it alleged facts constituting a conspiracy to violate Section 47 of the Criminal Code (18 U. S. C. 100) (R. 51-53).

The evidence for the Government may be summarized as follows:

Croom, a sergeant in the United States Army stationed at Camp Gruber, Oklahoma, was in

Croom had been tried by court-martial and sentenced to three years' imprisonment (R. 15-16).

<sup>2</sup> 18 U. S. C. 80 punishes, *inter alia*, the making of any false claim against the United States.

charge of a ration detail for a prisoners of war camp (R. 16). It was his duty to obtain food supplies from the quartermaster and deliver them to the prison camp (R. 16, 26). Petitioner was the owner or operator of the Smith Mercantile Company at Braggs, Oklahoma (R. 20-21, 39, 43), and employed Atyia and one Fullington as clerks (R. 21, 33-34, 39). On November 3, 1943, Croom asked Fullington if he would like to purchase some butter and Fullington replied that he would "see the boss" (R. 16, 19). A few days later Fullington told Croom to bring the butter (R. 16). Croom then delivered to petitioner's store 32 pounds of butter which he had taken from the supply truck of the prison camp (R. 16). Petitioner paid Croom for the butter (R. 16, 17, 18). Subsequently, Croom delivered eggs in wooden crates marked "Inspected U. S. Army" (R. 17, 21) and more butter and some cheese, all taken from Army supplies (R. 17). On one of the occasions when Croom delivered eggs, petitioner was present and authorized Fullington<sup>to</sup> pay Croom with money taken from the cash register of the store (R. 18, 21), and on another occasion petitioner asked Croom what he had delivered and then paid him (R. 19, 20). Croom was in Army uniform when he made the deliveries (R. 20, 21, 22). The markings on the egg crates were obliterated by Fullington at the direction of petitioner, Atyia, and Croom (R. 21, 23).



## ARGUMENT

1. Petitioner contends (Pet. 18-20) that since, admittedly, the indictment failed to set forth a conspiracy to violate 18 U. S. C. 80, the section specified in the indictment, the district court erred in overruling his demurrer. However, it is well established that the designation by the pleader of the statute under which he purported to lay the charge is immaterial; the indictment is valid if it alleges facts which constitute an offense under any statute. *United States v. Hutcheson*, 312 U. S. 219, 229; *Williams v. United States*, 168 U. S. 382, 389; *Pickens v. United States*, 123 F. (2d) 333 (C. C. A. 5), certiorari denied, 316 U. S. 669; *Moore v. Hudspeth*, 110 F. (2d) 386, 388 (C. C. A. 10), certiorari denied, 310 U. S. 643. Here the indictment specifically informed petitioner that he and his co-defendants were charged with conspiracy unlawfully to deprive the United States of butter, cheese, and eggs. Such a conspiracy was one to steal property of the United States in violation of Section 47 of the Criminal Code. Contrary to petitioner's contention (Pet. 16-18), it is not necessary that an indictment under this section, and *a fortiori*, an indictment for conspiracy to violate the section, contain the technical allegations of either common law larceny or common law embezzlement. Larceny of property of the United States is proscribed by Section 46 of the Criminal Code (18 U. S. C. 99), whereas

the word "steal" in Section 47 was designed to cover other transactions which might not fall within the common law definition of larceny or of embezzlement, but which, nevertheless, constitute the wrongful taking of property of the United States. *Crabb v. Zerbst*, 99 F. (2d) 562, 563-565 (C. C. A. 5); cf. *United States v. Handler*, 142 F. (2d) 351 (C. C. A. 2), certiorari denied, October 9, 1944, No. 124, this Term. Here the conduct with which the defendants were charged in the indictment was an agreement unlawfully to dispose of property rightfully belonging to the United States, i. e., an agreement to "steal" property of the United States.<sup>3</sup>

2. Petitioner also attacks the sufficiency of the evidence to support his conviction on the ground

<sup>3</sup> It is therefore unnecessary to determine whether the court below was correct in holding that Section 36 of the Criminal Code was inoperative as a criminal statute by reason of the uncertainty of the punishment specified in that section (R. 51-52). At the time of the adoption of the Criminal Code, Section 35, to which Section 36 refers for punishment, fixed a punishment of five years' imprisonment and \$5,000 fine for certain acts and \$500 fine and imprisonment for two years for other acts. The statute was amended to fix a definite punishment by the Act of November 22, 1943, c. 302, 57 Stat. 591, before the return of the indictment herein but after the date of the last overt act charged in the indictment (R. 1-6).

Since the offenses defined in Section 36, the section relied upon by the United States Attorney (see p. 4, *supra*), and in Section 47, the section upon the basis of which the circuit court of appeals sustained the conviction, contain substantially the same elements, the rights of petitioner were obviously not prejudiced by the upholding of his conviction for conspiracy to violate Section 47.

that the Government relied principally on the testimony of accomplices Fullington and Croom, and that there were inconsistencies between the testimony of these two witnesses (Pet. 20-31). The circuit court of appeals after fully reviewing the evidence (R. 53-55) concluded that "The evidence was sharply conflicting, and that which was relied upon by the Government was inconsistent in respect to some material matters, but there was sufficient competent evidence from which the jury was warranted in concluding that the appellant had guilty knowledge of the unlawful transactions, and its verdict must stand" (R. 55). The inconsistencies between Croom's and Fullington's testimony to which petitioner adverts (Pet. 21-23) were, we submit, on comparatively minor matters, such as whether butter or eggs constituted the first delivery. Cf. R. 16 with R. 21. The two witnesses corroborated each other on the important issue in the case, i. e., petitioner's participation in the conspiracy. For example, both testified that on one occasion Fullington paid Croom for one case of eggs with money taken from the cash register with petitioner's consent (R. 18, 21), and that on another occasion petitioner himself paid Croom (R. 18, 22).<sup>4</sup> The

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<sup>4</sup> There was corroboration of these witnesses to the extent that Army personnel identified egg crates and butter found in petitioner's store as merchandise taken from Army stores at Camp Gruber (R. 25, 26). In any event, it is well established that conviction for a federal crime may rest on the

jury had before it on the one hand the testimony of Croom and Fullington as to petitioner's knowledge of and participation in the conspiracy, and on the other hand the testimony of petitioner and Atyia as to petitioner's lack of knowledge. The issue was wholly one of the credibility of the witnesses and presents no question warranting further review by this Court. *United States v. Johnson*, 319 U. S. 503, 518; *Delaney v. United States*, 263 U. S. 586, 589-590.

#### CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1945.

uncorroborated testimony of accomplices. *Caminetti v. United States*, 242 U. S. 470, 495. *Westenrider v. United States*, 134 F. (2d) 772, 774 (C. C. A. 9); *United States v. Riedel*, 126 F. (2d) 81, 82 (C. C. A. 7); *United States v. Quinn*, 124 F. (2d) 378 (C. C. A. 2); *Robertson v. United States*, 111 F. (2d) 1018 (C. C. A. 6).